No. 3026

United States Circuit Court of Appeals

For the Ninth Circuit

RELIANCE CONSTRUCTION COMPANY, a corporation; CITY OF HOOD RIVER, a municipal corporation, and NATIONAL SURETY COMPANY, a corporation,

Appellants,

vs.

HASSAM PAVING COMPANY, a corporation, and OREGON HASSAM PAVING COMPANY, a corporation,

Appellees.

Brief of Appellees

On Appeal from the District Court of the United States for the District of Oregon.

RALPH R. DUNIWAY
Solicitor for Appellant

CAREY & KERR
Solicitors for Appellees

LOUIS W. SOUTHGATE
Of Counsel

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CRITICISM OF THE RECORD.

The record presented upon this appeal may at first sight seem more voluminous than necessary to present a question of the correctness of a master's findings upon items in an account. But it will be found upon closer examination that besides items in the account that are challenged, a bold claim is

made that the defendants are not liable for damages, that two of them never had an opportunity to be heard upon the question of damages in court or in the accounting proceedings, and finally that the method of estimating damages adopted by the master and by the court is not justified by the evidence.

The appellants now protest that there is much in the record on this appeal that is unnecessary, and that the arrangement is confusing. As to the latter, it is confusing; and it is confusing because the appellants have put the material together out of sequence and without distinguishing features to indicate separate documents printed. The printing of copies and testimony verbatim became necessary because of the character of the statement of facts originally prepared by the appellants, as is shown by the certificate of the court, (p. 404); and because of the nature of appellants' assignments of error.

However, as will be seen in this brief, there is not a document printed in the transcript, and there is scarcely a word of the testimony, but will have its necessary place in the argument on this appeal, and a bearing upon whether the defendants are all properly held for plaintiffs' damages.

The attempt of the appellants' counsel to make it appear that National Surety Company and City of Hood River were not represented before the master, and are not bound by his finding of damages,

necessitates the examination of the pleadings, the decree, the former appeal, and the stipulations and orders, and particularly the various references throughout the record to the representation of these defendants by counsel.

This claim was first put forward by appellants' present solicitor on an application for a rehearing, after the final order or decree had been entered (p. 128). The very solicitor that conducted the proceedings before the master, and who now claims that two of his clients were not represented, signed a stipulation to take a deposition on the subject of plaintiffs' damages as "solicitor for defendants" (p. 223), was served with the plaintiffs' account of damages in debit and credit form "showing damages from infringement by the above named defendants," (p. 185), called many witnesses as witnesses for "defendants" whose testimony was offered to dispute plaintiffs' damages, and in numerous places throughout the master's record is shown to have appeared and opposed the claim of damages as "solicitor for defendants," and even now is conducting appeals in which he represents all the defendants.

The jumbled transcript of record, and the insufficient index, as prepared by the appellants, whether so designed or not, leaves the court to a difficult task of ascertaining just what was done before the master on the accounting. We therefore supplement the index as printed in the record, as follows:

ADDITIONAL INDEX.

PRELIMINARY STATEMENT.

This is the second appeal in this suit. The opinion of the Court of Appeals in the Consolidated Contract Case, which disposed of the first appeal in this case, is found in 227 Fed. Rep. at p. 436.

The complaint charges the defendants jointly and the decree found them guilty of joint infringement.

ESTOPPEL.

The first appeal challenged the correctness of this finding and among other assignments of error therein were the following (Record, pp. 75-76):

> "*Fifth*: That the said District Court erred in deciding and determining that said defendants have infringed upon the rights of said complainants claimed under the said three letters patent, No. 819,652, 861,650 and 851,625."
>
> "*Sixth*: Said District Court erred in finding and determining that the complainants are entitled to recover damages from the said defendants by reason of any violation of any rights of the complainants under said letters patent."
>
> "*Seventh*: That the said District Court erred in determining and deciding that the complainants should have a perpetual injunction in this case against the defendants and each of them, restraining them, their agents, clerks, servants and all claiming or holding under or through them or either of them, from making, selling, using, or disposing of pave-

ments and structures embracing the alleged inventions or improvements described in the said letters patent."

"*Eighth*: That the said District Court erred in not finding and decreeing for said defendants on the record."

"*Ninth*: That the Findings and Decree of the said District Court are against the law and equity in the case."

The appeal in the Reliance Case was suspended until the decision in the suit by the same plaintiffs against Consolidated Contract Company and Pacific Surety Company, and by stipulation the parties agreed to "abide by the determination and result of the said cause so to be heard and determined by the said Appellate Court." The stipulation (p. 92) contained the following clause:

"That is to say in the event the decree in the cause on appeal shall be affirmed, the decree of the United States District Court for Oregon shall stand, and an order be entered dismissing the appeal in this cause; and in the event that said decree in the cause on appeal shall be reversed, then the decree of said District Court in this cause shall also be vacated."

After the affirmance of the decree in Consolidated Contract Company Case by the Circuit Court of Appeals, and after that court had denied the motion for rehearing, (wherein the point was made and argued by the briefs that the surety company was not liable), a second stipulation was entered

into by all the parties to the Reliance Case now on appeal (p. 93) which expressly agreed to abide by the decree and agreed that the parties proceed with the accounting, as follows:

> "It is now therefore agreed by and between the parties hereto that the appeal in this suit shall be abandoned and that the original decree of the United States District Court for the District of Oregon, made and entered on the 27th day of April, 1914, shall stand as the final decree in this cause, notwithstanding the said appeal, and that the appeal shall be withdrawn; and,
>
> "Whereas, by the original decree the said cause was referred to Wallace McCamant, Esq., the Standing Master in Chancery,
>
> "It is further stipulated and agreed that the parties proceed with the said accounting under the said decree and in accordance with the terms thereof."

It was upon this state of the record that the District Court made the order dated March 27, 1916, containing, after recitals, the following (p. 97):

> "Now, on motion of said plaintiff, in accordance with the said stipulation, it is ordered that the appeal in this cause be deemed abandoned, and that the original decree of this court, made and entered on the 27th day of April, 1914, will stand as the final decree in this cause, notwithstanding the said appeal. And it appearing that by the said original decree this cause was referred to Wallace Mc-

Camant, Master in Chancery of this court, to ascertain the damages suffered by said plaintiffs, and that said reference was stayed by said appeal,

"It is further ordered that the said Master in Chancery proceed with the said reference in accordance with the terms of the said decree."

It will be observed that in these proceedings all of the defendants appeared and were jointly represented by counsel.

JOINT LIABILITY AND JOINT DEFENSE.

The complaint charged that the City of Hood River let a contract for the improvement of certain streets with a pavement the construction of which would involve the use of the Hassam patents. The contract was let to the Reliance Construction Company, and the city having been notified that it would be held for the infringement, the contract was made to contain a provision requiring the contractor to indemnify the city against all claims for royalties or damages by the use of patents.

The contractor, therefore, was not only required by the city to give the usual contractor's bond, but in addition thereto was required to furnish a bond with National Surety Company as surety, in the penal sum of $9,500, to save the City of Hood River harmless "of any and all loss or damages which it may suffer on account of or growing out of any suits which may be instituted against the said city

by any person, persons or corporation on account of infringement of patent."

The specifications made a part of the contract expressly stipulated that all fees and royalties for patented inventions should be included in the contract price and the contractor should protect the city from the same, and before receiving final payment would exhibit satisfactory release from all such claims. (p. 214.)

The complaint charges a joint wrong (p. 33) that "under and by the terms of the said contract and bond and the said ordinance, the said defendants have contracted and agreed and undertaken to and are actually proceeding to make, use and sell" the patented pavement. The complaint also shows that after the contract was let and before the work was begun (p. 34) the complainants gave notice of the patents to the City of Hood River and to the mayor and council thereof, and also to Reliance Construction Company, defendant, and warned the defendants and each of them not to infringe the patents, and that in case of an infringement they would be prosecuted as provided by law, but that notwithstanding the notice and warnings the defendants decided and agreed together that the contract should be performed.

Also (p. 34):

> "That the defendants well knew and at all times herein mentioned were fully advised of

> the fact that your orator, Hassam Paving Company, has been the exclusive owner of the said patents and that your orator, Oregon Hassam Paving Company, has been the licensee aforesaid under the said patents, and the defendants and each of them deliberately decided and agreed together that they will, notwithstanding the premises, infringe each and all of the claims of each and all of the letters patent," etc.

The prayer of the complaint, was, among other things, for a decree that the defendants and each of them be compelled to account for and pay

> "all the profits which they may have derived from any making, using or selling of any pavements or artificial structures covered and secured by said letters patent or any of them, and that also the defendants and each of them be decreed to pay all damages which your orators have incurred or shall incur upon account of the said defendants' infringement," etc. (p. 38.)

The answer was a joint answer of all of the defendants challenging the validity of the patents and the novelty of the inventions.

After a trial the decree was entered by the District Court on the 27th day of April, 1914, (p. 68). By this decree among other findings it was held:

> "That the defendants infringed upon the said letters patent and upon the exclusive rights of the complainants under the same, that is to say, by making, using and selling pavements and artificial structures embodying the

said inventions and improvements patented as aforesaid, as charged in the bill of complaint." (p. 70.)

It was further decreed as follows:

"That the complainants do recover of the defendants the profits, gains and advantages which the said defendants have received or made, or which have arisen or accrued to them or either of them by the manufacture, use or sale of the said pavements and artificial structures in violation of the said letters patents since the 1st day of May, 1913, and that the complainants do recover the damages resulting from said infringements." (pp. 70-1.)

DECISION FINAL AS TO LIABILITY.

A provision of the decree referred the case to the standing Master in Chancery for an accounting on both profits and damages (p. 71). The complainants were decreed on such accounting to have the right to cause the examination of the officers of the defendant corporations, and also the production of the books, vouchers and documents of said defendants and that the officers attend for such purpose before the master from time to time as he should direct. (p. 72.)

The evidence upon which that decree was rendered is not now before the court, but it should now be assumed that it justified the finding and decree that the three defendants infringed, and jointly made, used or sold the infringing pavement. The

finding is distinctly a finding that they were joint tort-feasors.

The record now before the court on this appeal does show, however (though but incidentally), that there was justification for the finding and decree. We assume that on this second appeal, particularly as the court has not the evidence before it, the fact that the three defendants are joint tort-feasors is a settled fact. It may be of interest to refer, nevertheless, to the following circumstances shown by this record:

1. On March 13, 1913, the Oregon Hassam Paving Company executed a general license offer, available to all contractors, and the same was filed with the City Recorder on March 18, 1913. (pp. 173, 193.)

2. On March 24, 1913, the minutes of the city council show that bids were received from three bidders, including Oregon Hassam Paving Company, for this contract work, and the contract was let to Reliance Company. (p. 220.)

3. The next higher bidder was E. O. Hall, who was ready to take the contract and pay plaintiffs a royalty according to the terms of the general license offer. (Deposition of E. O. Hall, 224-235.)

4. On April 7, 1913, Oregon Hassam Paving Company and its attorneys presented to the city council communications relating to the Hassam Paving Company's rights to lay Hassam pavement

in the State of Oregon, but, notwithstanding this, at the same meeting the city council approved and accepted the bonds of the Reliance Company with National Surety Company as surety. (p. 222.)

5. On April 9, 1913, a letter was addressed by Oregon Hassam Paving Company to Reliance Company offering it a license (p. 173) which it did not accept.

6. The bonds so accepted were two in number, one the usual contractor's bond and the other an express bond to cover the patent infringement. (pp. 213 and 215.)

7. The clause, section 25, in the specifications was inserted by the city after it was informed by plaintiff of its patent rights and that if the pavement was laid by anybody without conforming to the license offer on file, the city would be held liable. (p. 259.)

Therefore, even from this record the decree holding the defendants as deliberate infringers acting jointly and in defiance of plaintiffs' rights is not without support.

The case here may be readily distinguished from

Vrooman v. Penhollow, 222 Fed. 894.

From the decree, as already stated, the defendants joined in a petition for an appeal (p. 73), and filed their joint assignment of errors (p. 74), including the assignments hereinabove quoted.

CONCERT OF DEFENDANTS.

Messrs. Jesse Stearns and John H. Hall, solicitors for the defendants, signed the petition for appeal and the assignment of errors in behalf of all of them jointly. All of the defendants appeared and applied for the order allowing the appeal, and the bond on appeal was signed by all of the defendants by Jesse Stearns, attorney (pp. 77 to 80.) Numerous stipulations in the record were signed by the same attorneys for all the defendants jointly. (pp. 66, 73, 77, 78, 79, 81, 85, 87, 88, 89, 91, 93.) These stipulations however unimportant in themselves are set out in this record to show that although the original answer in the suit had been signed by a special solicitor for the City of Hood River as well as by Messrs. Stearns and Hall as "Solicitors for Defendants," yet almost invariably afterward, from the beginning, the defendants have appeared jointly by the same counsel, who have actively managed the case for all concerned. As will be shown later in this brief the record of the proceedings on the hearing of plaintiffs' claim for damages before the master, as reported by him, continues to show that nearly always all of the defendants were jointly represented in similar manner. And they are represented upon this appeal by the one solicitor who conducted the hearing before the master, sometimes signing as solicitor for "defendants," and sometimes as solicitor for "Reliance Construction Company."

WITHDRAWAL OF SOLICITORS FOR RELIANCE CONSTRUCTION COMPANY.

Notwithstanding the express stipulation of all of the parties to proceed with the accounting, the statement of evidence and proceedings before the Master in Chancery (Record, p. 164), shows that notice was given to him on the day of the hearing that Mr. Jesse Stearns and Mr. John Hall had withdrawn as solicitors for the defendant Reliance Construction Company (nothing is said about withdrawing as solicitors for the other two defendants.) Thereupon, on application of complainants a master's summons was issued (set out in full at page 103), directed to Reliance Construction Company and National Surety Company, both of which companies were served by the marshal. This summons expressly required them or the one of them having the most certain and full knowledge of the same, to render account of the profits made upon the infringements, and also to produce books showing the cost of labor and materials, and all profits made in the performance of the contract. (p. 165.)

Prior to that date, on April 20, 1916, a letter over the signature of complainants' solicitors had been mailed to Mr. Stearns and Mr. Hall as "attorneys for Consolidated Contract Company, Reliance Construction Company, et al.," notifying them of the date of the accounting and requesting them to "produce the account books of the defendants, with all

original contracts, and be prepared to make full disclosure as to all infringements of the patents covered by the decrees in those cases, with full statement of all receipts and disbursements and a full account of the profits, if any, made through the use of the Hassam patents." (p. 100.) This letter is referred to in an affidavit upon which the subpoena was based. (See Affidavit, p. 97.)

On the 3rd day of May, 1916, "the defendant the Reliance Construction Company appears by Mr. Ralph R. Duniway, its solicitor, and the defendant the National Surety Company appears by Mr. Harrison Allen, its solicitor, and thereupon on application of the solicitor for defendants this hearing was postponed, * *." It does not disclose which of the solicitors for the "defendants" made this application, but it does show that Reliance Construction Company was then ordered to produce its accounts as required by the decree and bring to the hearing the books, vouchers and correspondence specifically listed in the master's summons served upon it. (p. 166.)

On the 9th day of May, 1916, the next meeting before the master, the Reliance Construction Company "appears by Mr. Ralph R. Duniway, its solicitor, and the defendant the Reliance Construction Company thereupon presents an account of the profits." (pp. 166-7.)

A stipulation was entered into for the taking of

the deposition of the witness E. O. Hall, relating to plaintiffs' damages, to be used before the master, and this stipulation was signed by Ralph R. Duniway, "Solicitor for defendants." (p. 223.)

That all of the defendants were thereafter represented before the master and contested plaintiffs' claim is shown on the following pages:

Page 281, "Counsel for defendants" renew an objection to the tabulated sheets that show plaintiffs' profits, being summaries from their books, on which plaintiffs based their claim of damages.

289, "Defendants" appeared by Duniway, solicitor, and the entry shows "the parties" present.

314, A witness, formerly mayor of Hood River, was called as a witness for "defendants" and testified against plaintiffs' claim of damages.

326, A city councilman, a "witness for the defendants," gave similar testimony.

328, Same.

329, Same.

330, Same.

331, A "witness for the defendants" was called to support the Reliance Construction Company's account of profits.

366, Same.

391, A "witness for the defendants" testified as to good faith and lack of malice in the infringing.

392, Leave given "defendants" to file copy of portions of city charter.

Our examination of the master's record shows that in all instances but two where witnesses appear for the defense, they are noted in the record as witnesses for "defendants." And while it is true that twice at least the solicitor for the defense is referred to in the record as "for the defendant," this occurs not so frequently as the solicitor for complainants is referred to therein as for the "complainant," which happens at least ten times, as we count it. Yet it will not be claimed that both complainants were not represented. So far as we have been able to find, there is only one place in the entire record of the master's proceedings after the accounts were filed where "Reliance Construction Company" is separately mentioned as appearing. (p. 279.)

Now all this may seem trivial, and undoubtedly it is. The excuse for such an examination of the notes of the master's proceedings is the character of the claim made on this appeal.

The City of Hood River and the National Surety Company were parties and were bound to take notice of the proceedings. They had the right to attend or stay away. They had expressly stipulated that "the parties proceed with the accounting." They have asked no leave to reopen the case and to have the accounts referred again to the master to receive

additional evidence. The entire record disputes their claim that they were not aware of the accounting proceedings, and they do not pretend that they have any other evidence to offer. The surety company at the least appeared by Harrison Allen as solicitor, and the city had the benefit of the testimony of the mayor and councilmen, and a certified copy of its record, with the parts of the city charter deemed material by its solicitor. If there is any other evidence, the lack of which materially injures its rights, it was not called to the attention of the court.

The findings of fact by the Master in Chancery is a computation of "the profits of the defendant Reliance Construction Company in the work done by it which has been adjudged by the court to be an infringement of the patent owned and controlled by the plaintiffs, said hearing being also directed to the damages sustained by the plaintiffs." (Record, p. 108.) He expressly says that "the respective parties have submitted testimony in support of their contentions."

The findings are that the profits of Reliance Construction Company were $2,362.40, and that the damages of plaintiffs from the infringements are the sum of $4,527.73.

NO EXCEPTIONS FILED BY NATIONAL SURETY COMPANY OR CITY OF HOOD RIVER, DEFENDANTS.

The only exceptions filed were those of Reliance Construction Company. (Record, p. 118.) The other two defendants have filed no exceptions so far as the record shows, although the final order entered by the court (Record, p. 126) refers to the exceptions as those of "Reliance Construction Company and National Surety Company." The order finds "the damages sustained by the complainants from the infringements of their patents described in the complaint are the sum of $4,527.73 and that the profits of Reliance Construction Company in the infringement aforesaid are $2,362.40." The order is that the complainants have and recover of and from the defendants, and each of them, the sum of $4,527.73 damages as aforesaid, together with their costs and disbursements to be taxed.

FIRST ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

Pursuant to the master's requirement the Reliance Construction Company on May 9, 1916, furnished its account of profits. (p. 167.)

This account contained three items in the debit side under date January 19, 1915, (bottom of page 170) which were objected to by plaintiffs (top of page 189). One of the items was "expense $604.82."

The bookkeeper for Reliance Company was at once called as a witness by plaintiffs and was asked about these entries. He admitted that he had entered these three items in the account since the proceeding before the master had begun. (p. 237.)

By the entries so made the apparent profit earned by the contractor was decreased on the books from $3,094.09 to $1,900.34, and the date of the entry was set back to an apparently arbitrary time, January 19, 1915, although the entry was made in May, 1916, and although the last preceding balancing of the account was on January 31, 1914, as of date January 1, 1914. (p. 237.)

The item of expense, $604.82, so entered was not derived from any actual disbursement of that amount on the work, but was obtained by the bookkeeper by taking a proportion of what was asserted to be the total overhead expenses of the company in handling all of its business. The method used was to divide the total face amount of the company's contracts by the total overhead expense (p.

238). The totals so divided covered contract work before Reliance Company was in existence, (pp. 240 and 241, and page 291), and also covered business of contracting at Weiser, Idaho, kept in a separate ledger (p. 293).

The plaintiffs claimed that the infringer carrying on a general business covering various contracts, and infringing while performing one of these contracts, is not entitled to deduct from the profit earned on the latter contract any overhead expense of carrying on its business, when accounting to plaintiffs for profits earned out of the infringement. This we believe to be the law, but the master seemed not to distinguish this case and allowed a deduction.

But if overhead profits are to be charged in the account, the method employed by the defendant company was manifestly unfair. This was pointed out by the testimony of a certified accountant, Gillingham, who showed that by the correct method of apportioning overhead profits not more than $55.11 instead of $604.82 should be applied to the infringing contract work (p. 294).

It was a matter of dispute, on which there was evidence pro and con. But the master, who says he found difficulty in determining what correction should be made in the account to meet his views, deducted $300 leaving $304.82 to be allowed (p. 116). We deem this more generous to defendants than just to plaintiffs.

The Reliance Company did not keep any account of the alleged overhead expense in its ledger or furnish any detail thereof. It cannot have the benefit of deductions from profits unless it clearly shows such deductions are applicable solely to the matter in hand. If commingled, so that to allow them, the master must resort to an estimate or approximation, they should be disallowed entirely.

Decker v. Smith, 225 Fed. 776.

An examination of the overhead expense account showed that it contained items not proper to be charged to such an account. No detail of the whole, of which a percentage was charged to this infringement work was furnished, and no statement of its contents was given, although witnesses were called by the defendants to testify that it was a reasonable and a fair method of ascertaining the expense (pp. 366, 378-380).

We respectfully urge that there is no reason for not applying the usual rule to the finality of the master's finding, but if it is to be changed then the whole overhead should be excluded from the account of the infringer's profits, there being but one infringing contract, the contract company being a going concern, and no evidence being offered to show that the overhead expense of the company was increased by the performance of this contract, or that it was charged in the account except as an afterthought.

SECOND ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

The second assignment of error relates to the finding and decree of damages estimated upon a reasonable royalty of twenty-five cents per yard. It is an assignment not made by the other two defendants.

The rule is that findings of fact by the master have all the presumptions in their favor and should not be set aside unless error clearly appears.

The master stated his reasons for reaching the conclusion that twenty-five cents per yard is a reasonable royalty to be awarded as a measure of damages for the infringement (p. 111), and the District Court also gave its views thereon in its confirmation of the report (p. 126), and again more fully in denying the motion for rehearing (p. 137). Certainly upon the evidence, this award (as was remarked by the court), is as favorable to the defendants as they can reasonably ask or expect.

The finding has its support in

Dowagiac Mfg. Co. v. Plow Co., 235 U. S. 648,

and in other cases therein reviewed, and in various decisions following that authority. The principle is now so well established, especially in the Ninth Circuit, that we content ourselves with a brief discussion of its application to the facts here, supplementing what has been said by the trial court.

The Hassam Paving Company for a consideration of fifteen cents a yard gave an exclusive territorial right covering Oregon to Oregon Hassam Paving Company. The latter company prior to and during the year the infringing pavements were laid kept for its own purposes elaborate and detailed statistics as to the costs and profits in its operations in laying the patented pavement in Oregon. The figures are in evidence and are undisputed (Complainants' Exhibits 3, 4 and 5, see pages 252-5 and 281). The pavements laid by the Oregon Hassam Paving Company, including the amount paid for the license to the parent company at fifteen cents per yard, during the year 1913 in which the infringing pavements were laid, brought a net average profit of $.4523 per square yard. The complainants maintained a close monopoly, being amply able financially and otherwise to lay all pavements in the district (see page 256). The City of Hood River negotiated with them for the pavement, but the established price of $1.70 per yard was underbid by the Reliance Company which took the contract at $1.35 per square yard (page 221), agreeing by the contract to indemnify and hold harmless the city against all royalties and damages for the infringement, and furnishing a special bond to cover this.

Another bid was offered by a Mr. E. O. Hall of Hood River at $1.50 per yard, which was between the bid of the Hassam Company and that of the

Reliance Company, and he testified that had he been awarded the contract he intended to take advantage of a general license offer of complainants and pay them fifty cents per yard royalty (see Hall's deposition, p. 225). The bid of the Oregon Hassam Paving Company was $1.70 per yard.

The license so referred to was on file with the city recorder and is set out in the record (p. 193). By its terms the Hassam Company was to furnish a grout mixer and a steam roller, and certain skilled workmen. The furnishing of these would cost the Hassam Companies four cents per yard, leaving net profit to them 46 cents per yard if the license had been accepted and paid for. (p. 186.)

The infringing company, after the contract was awarded and before it began to infringe, was offered the privilege of using the patents under this general license, but did not accept (p. 260).

On the accounting complainants, as required by the rule, filed their debit and credit statement showing their damages in three alternative forms (p. 185).

The first claim was for damages estimated on the general license offer of fifty cents per yard, less four cents per yard, or net forty-six cents per yard.

The second claim was for damages estimated upon the plaintiffs' average profits for such work at $.4523 per yard, as shown by their own books.

And the third claim was for damages based on the loss of the contract at the bid of $1.70 per yard by the underbidding of the infringer.

There was no established royalty of universal application, for as already stated the complainants had maintained a plant and were prepared to do and did all paving in this district. But the fact that the defendants with full knowledge of the plaintiffs' offer on file at Hood River proceeded with the infringement, may be said to raise the implied obligation and agreement in law to pay that license or at least a reasonable royalty. And such is the decision.

We complain that the master and the honorable court in awarding the damages diminished the same to twenty-five cents per yard to allow the infringer something so as not to "absorb substantially all the profit which could be made in laying Hassam pavement," as the master puts it (p. 114). We think we are not required to share profits with the infringers, and we should have been allowed as reasonable royalty the full license offer, especially as it conformed to a fraction of a cent with the average profits according to experience, as shown by uncontroverted evidence, and especially as the next bidder would have paid that amount. We do not claim that fifty cents per yard was an established license charge of universal application. But the offer and the fact that it would have been paid

by another is worthy of being considered in estimating a reasonable royalty.

However, on the assumption that the master's findings would not be disturbed where there was no demonstrable error the plaintiffs filed no exceptions and asked confirmation. But we think the District Court was justified in the observation that the royalty of twenty-five cents per yard is as favorable to the defendants as they can reasonably ask or expect.

The finding of what is a reasonable royalty in each case must stand upon the circumstances shown. The duty is much like that of a jury in estimating damages under like circumstances. In such cases it is not necessary that the evidence specifically show a definite sum, but the sum arrived at will usually be an approximation reached by an intelligent application of reason and judgment to the facts shown.

Cons. Rubber Tire Co. v. Diamond R. Co., 226 Fed. 458.

United States Frumentum Co. v. Lauhoff, 216 Fed. 611.

As already said the local Hassam Company had an exclusive territory assigned to it, for which it was to pay the parent company fifteen cents per yard for the privilege. The profit of the local company was subject to this rental. The introduction of the new pavement involved promotion work and

much expenditure of capital, but the Oregon Hassam Paving Company was ready and prepared to lay all pavement of this type in the district. That the infringement injured its business generally, and materially diminished its sales while taking from it a specfic profitable contract is amply shown by the record. We quote from the testimony of J. H. Crane, manager, at page 304:

> "Q. How extensively in the State of Oregon has Hassam pavement been used?
>
> A. I will say between nine hundred thousand and a million square yards.
>
> Q. Has your company had any infringement brought to your attention other than that involved in this suit against the Reliance Construction Company?
>
> A. This and the Consolidated Contract Company.
>
> Q. What effect, if any, has the infringement by the defendant the Reliance Construction Company and that by the Consolidated Contract Company had upon the business of your company in laying Hassam paving in Oregon?
>
> A. We lost the contract in Hood River and several contracts in Portland by these parties laying our pavement without our permission.
>
> Q. Prior to the time your company engaged in business in Oregon had this article of manufacture — Hassam pavement — been in use in this state?
>
> A. No, we introduced it here.
>
> Q. What promotion work was done by your company to get it introduced?

A. They interviewed the property owners whose property was to be assessed for the proposed improvement and in consideration of their accepting Hassam pavement gave them some very low prices for laying the pavement, had several meetings with the city engineer, explaining the process of laying the same, and gave references to other cities where it had been used, and work of that character.

Q. Will you state whether or not your pavement was laid in competition with other meritorious pavements of somewhat similar character?

A. Yes, it was.

Q. What is the fact as to whether or not your company have had any competition here with other paving companies throughout the entire period?

A. We have had very severe competition since the organization of our company in this city. (pp. 304-5.)

* * * * * * * *

Q. What is the capital of your company?

A. $150,000.

Q. How much cash did your company have in the bank at that time?

A. I think probably between forty and fifty thousand dollars.

Q. Did your company have any bank credit at that time?

A. It did.

Q. Arranged for?

A. Yes.

Q. With what bank?

A. The Canadian Bank of Commerce.

Q. To what extent?

A. In 1913 we had a credit of $300,000.

Q. So with the financial resources available, you could have carried on this contract, had it been awarded to you?

A. We could.

Q. Was your company at that time engaged in the business of laying these Hassam pavements in this district,— the Oregon country that is mentioned in the license of the Hassam Paving Company?

A. We were.

Q. To what extent?

A. By referring to the year 1913, I think we completed in the City of Portland that year 126 thousand and some hundred square yards.

Q. Will you state whether or not at that time you had the necessary equipment that would be required to carry on this job at Hood River?

A. We had.

Q. Consisting of what?

A. We had six rollers, three ten tons and three six tons, seven Hassam grout mixers and all the small tools that are necessary for constructing that type of pavement." (pp. 256-7.)

What the court has determined by its decree is that the profits made by the infringer are not sufficient to compensate the plaintiffs, and in effect has said that these shall be supplemented by the excess of plaintiffs' damages over those profits. Here the evidence showed that the injury sustained

by the infringement was greater than the profits gained by the contractor, and damages were accordingly allowed.

Riverside Heights Orange Growers' Assn. v. Stebler, 240 Fed. 714.

THIRD ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

The third assignment is to the effect that the plaintiffs are entitled to recover the profits made by Reliance Construction Company, but are not entitled to plaintiffs' damages. It is not joined in by the other defendants.

In view of the statute which is explicit, and the numerous decisions, construing and applying it, we fail to appreciate the object of this assignment.

We assume that the law is well settled that plaintiffs are entitled to recover their damages from infringers, and that if such damages exceed defendants' profits the judgment will carry the larger sum.

That plaintiffs were damaged by an infringement that discredited their patent rights, cut their established commercial price of $1.70 per yard to $1.35 per yard is too plain to need argument. But it is fully shown by direct testimony (pp. 304 and 310).

The amount of plaintiffs' damages and the method of estimating the same is treated elsewhere in this brief under the second assignment of Reliance Company.

THE FOURTH ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

This is fully covered in what is said concerning reasonable royalty under Assignment Second of that company. It is not joined in by the other defendants.

It is a mere repetition of the claim that the defendant is not liable for damages.

THE FIFTH ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

This seems to be a repetition of Assignment First, and is covered by our brief on that point. It is not joined in by the other defendants.

THE SIXTH ASSIGNMENT OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

This assignment seems fully covered by the fourth and fifth, which themselves are included in the first and second assignments. The other defendants do not join.

THE SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR OF RELIANCE CONSTRUCTION COMPANY.

In view of the fact that neither City of Hood River nor National Surety Company filed any exception to the master's report, their assignments of error can have no standing.

Rule 66.

The Court of Appeals will not review a master's report upon objections taken there for the first time.

Riverside &c. Co. v. Stebler, 240 Fed. 703.

Exceptions to the master's report must be filed within the time prescribed by Rule 66 or the objection will not be considered.

Decker v. Smith, 225 Fed. 776.

The decree holding these defendants jointly is final, and objection comes too late. We quote from

Stockholm v. Duncan, 226 Fed. 740, at p. 744, as follows:

> "Defendants further contend that there is nothing in the record to justify the judgment against the individual defendants. The objection if good comes too late. The original decree and the order remanding the cause both run against all of the defendants. However, upon the record, we discover no reason why, under the circumstances of this case, such a decree was not properly entered. The objection is not deemed well taken."

It has been held that a city having been notified has no equity on the ground of being a public corporation to claim exemption from the usual temporary injunction in patent suits.

Pelzer v. City of Binghampton, 95 Fed. 823.

The liability of the city could not be measured by the profits made by the contract company. It was not liable for such profits.

Elizabeth v. Pavement Co., 97 U. S. 126.

But it would, as a joint infringer, be liable to plaintiff for damages.

See opinion of the District Court (pp. 142-3), and cases cited.

A city is liable for damages for infringement.

Campbell v. The Mayor, 81 Fed. 182.

Munson v. The Mayor, 3 Fed. 338.

Brickill v. The Mayor, 7 Fed. 479.

Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140-144.

The Reliance Construction Company has eight assignments of error, and the other two defendants two each. Those of the City of Hood River and of the National Surety Company, however, may, on examination, be considered as but one each, and these identical with the seventh and eighth assignments respectively of Reliance Construction Company, viz: that the plaintiffs are not

entitled to a decree for damages against either the City of Hood River or National Surety Company.

Complete answer to this is found in the record, in fact more than one answer:

(a) Neither the City of Hood River nor National Surety Company, excepted to the master's report, or filed motion for rehearing (Record, pp. 118 and 128).

(b) The objection is not open to Reliance Construction Company, whose interests are not affected by a decree against its co-defendants.

(c) The question is *stare decisis,* having been covered by the assignments of error in the former appeal.

(d) The stipulation of March 27, 1916, (p. 93) provides that the decree shall stand, which adjudges these defendants liable for plaintiffs' damages, and the stipulation agrees that the parties proceed with the accounting.

(e) The order entered on this stipulation on March 27, 1916, on the application of the defendants as well as of the plaintiffs, by their counsel in open court, expressly provides that the original decree shall stand as the final decree, and directs the master to ascertain the damages suffered by plaintiffs (Record, p. 95). The decree holds these defendants liable for plaintiffs' damages and requires them to account.

(f) The master's report (pp. 107-8) shows that

the damages sustained by plaintiffs, as well as the profits of Reliance Construction Company, were under examination, and "the respective parties have submitted testimony in support of their contentions." And after finding the profits of Reliance Construction Company, finds the damages of the plaintiffs.

(g) The first time the claim was made in the record that the City and the Surety Company are not answerable for the damages was in a petition for rehearing (Record, p. 128) which was filed by Reliance Construction Company alone, and was not and never has been covered by any exceptions filed, (see paragraph (a) *supra*).

Claim is now made that the summons issued by the master ran to the Reliance Company and the Surety Company but not to the city. This objection cannot, at any rate, do the Surety Company any good, for confessedly the latter was duly served with the summons (p. 101). But it is not for the city to claim that it was not served with the summons when it had already stipulated that the parties proceed with the accounting (p. 95).

The city not being liable for profits, and not having done the work on the contract, it was not called upon for an account of profits, and properly the master's summons directing an accounting of contractor's profits and production of contractor's books was directed to the other two defendants.

The only defendant that filed an account of profits was Reliance Company, being the only company that could furnish such account. The record shows (p. 184) that the plaintiffs made no effort to compel the other two defendants to furnish such an account of profits earned. But this does not relieve them from liability for damages.

The obvious intention of the new rules to simplify the proceedings before the master, is to make the debit and credit account furnished to the master conclusive, excepting as to items that may be challenged by the other party.

Rule 60 does not require the master to issue a notice or summons to each defendant of the time and place of the hearing, but "to give due notice thereof to each of the parties or their solicitors." The same solicitor that now signs the appeal papers and brief for each and all of the defendants separately was in attendance throughout the accounting proceedings. For that matter, the mayor and councilmen appeared and testified before the master orally in denial of plaintiffs' account of damages. But the rules give to the master a broad discretion as to the mode of conducting the examination, and objections, if any, should be made to him, and not for the first time on an application for rehearing before the court, after the report and findings are confirmed.

The master's statement of the evidence and pro-

ceedings shows that the former attorneys withdrew as solicitors for the Reliance Construction Company only (p. 164).

But if it was intended to withdraw for all defendants, that was a matter which could not prejudice the rights of the plaintiffs to a finding on their account of damages. It was for the defendants to decide whether they would appear and challenge the correctness of plaintiffs' account or not.

The right to appear and examine plaintiffs concerning their account of damages, was under Rule 63 a right which they might exercise or not, and unless they did the plaintiffs' account of damages would stand.

Claim is made by the appellants that a witness for plaintiffs (Crane), on cross-examination by defendants' solicitor "stated that complainants were not yet proceeding for damages against the City of Hood River." (p. 184.) But an examination of Mr. Crane's testimony shows by the context that this answer relates to suing on the bond given by the Reliance Company and the Surety Company to indemnify the city. The testimony is found at the foot of page 273 and top of page 274. But, in any event, it is not to be supposed that the whole record of this suit, which shows the City of Hood River is being sued for the damages complained of, can be controverted and set at naught on such an answer

of a witness, even though he was manager of Oregon Hassam Paving Company. We submit that a corporation manager is not the corporation, and the latter is not bound by his ignorance as to the scope of a suit in court, or by his mistaken answer upon a matter outside of his duties as manager.

It is perhaps unnecessary to call the attention of the court to the extravagant language of the appellants' briefs. Several times in the Reliance brief reference is made to some imaginary reprehensible conduct of the plaintiffs that makes it contrary to equity and justice to award them damages. This apparently consists in not having applied for a temporary restraining order, and by this "appellees inequitably laid and set a trap" (p. 48), and "the appellant has been trapped by a series of circumstances and action into laying Hassam pavement," (p. 35), and much more to the same effect.

The claim is made that "appellees contented themselves with warning the appellant, Reliance Construction Company," (p. 34) instead of stopping the laying of the pavement by a preliminary injunction.

The record shows clearly that the license offer was filed a week before the bids (p. 259); that company was warned in writing as soon as the contract was awarded to it and before it made a binding agreement by furnishing the required bond. This was on April 3, 1913 (page 173), but it after-

ward put up its two bonds and guaranteed the city would lose nothing by the infringement. The bonds were dated March 29 (pp. 213, 215), and were approved at a council meeting April 7 (p. 222) at which meeting a written communication concerning the rights of the Hassam Company was presented to the council and filed. And after this, on April 9, a communication was addressed to the Reliance Company enclosing a copy of the general license offer and again offering to give a license. (p. 173.) It was after this that the infringing pavement was laid.

We outline these dates in this connection, at the expense of some repetition, that the court may see that the infringement was deliberate and premeditated. This is of no importance, perhaps, on this appeal, excepting as an answer to the extraordinary statements and arguments that run through the appellants' briefs,

"Thick as autumnal leaves that strew the brooks
In Vallambrosa. * * * "

Respectfully submitted,

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